Chapter 10

Voting Rights

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Introduction

Since the U.S. Supreme Court decided that George W. Bush would be President of the United States, everyone has been talking about voting but, as with the weather, no one has done much. Voting is said to be fundamental to our nation, but until the 2000 elections we didn't seem to understand how rickety our election process is.

We know that in our federal system voting is administered by states, each one having different systems of casting and counting votes. But it goes deeper, as we saw in November and December. Voting is actually administered by counties (3000 nationwide), and takes place at precincts (several hundred thousand) where it is administered by Volunteer-Managers-for-a-Day (more than a million all told). The differences we saw in Florida between how votes are cast, counted, and miscounted by voters and officials in different precincts — let alone different counties — are not news. They can never be eliminated entirely but in the past they have been tolerated far too much.

Small wonder that in such a system ascertaining the will of the people would not be easy even if everyone were pulling for an honest deal and a fair count and if we all shared the same vision of what that meant. But of course we don't. Therefore, working to improve our election system requires two focuses: (1) streamlining the system across-the-board, and (2) making the system fair to all voters and segments of voters.

The federal government has a wide role to play in all this. Its power derives from several sources, some of which are: (1) power to enforce constitutional guarantees, especially equal protection and due process; (2) plenary power over federal elections; and (3) ability to spend money and offer money to states on certain conditions. The responsibility belongs to the executive branch directly, as well as in seeking legislation, and in litigating before the judiciary.

I. Redistricting

The federal government should play an active role in shaping redistricting law to protect minority voters.

Since the recent release of 2000 census figures, most governmental units in the United States are actively engaged in redrawing their district lines. Time is short. Every state will have congressional elections in 2002, and most will also have state legislative elections at the same time. Therefore, with a few exceptions (such as states that have only a single U.S. congressman, or states whose legislative elections do not take place in 2002), each state will need three separate state redistricting plans. Some states also use districts to elect other statewide officials such as judges or highway

commissioners. Below the state level, innumerable cities, counties, school districts, water districts, and other governmental units are engaged in the same process, with the same 2002 elections facing most of them.

The direct federal role in redistricting is limited. District lines in each state are drawn by state bodies, and lawsuits over such lines are traditionally brought by private citizens and defended by state agencies. However, the Justice Department is armed under sections 2 and 5 of the Voting Rights Act to oppose racial or other minority discrimination in districting plans. Both these sections will be discussed more generally below, but at this point it is enough to say that the Department has played and can play a major role in achieving districting fairness through active use of section 2 and section 5.

- *Section 2* allows the Justice Department (as well as any private citizen) to file suit against any voting practice or procedure (including a redistricting plan) that has the purpose or result of discriminating on account of race. Such suits may be brought in any state, and in fact have been brought not only on behalf of black voters in the South, but also on behalf of Hispanic voters and American Indians.

- *Section 5* requires that in certain states and portions of other states all voting changes (including redistricting plans) must be sent to the Justice Department for "preclearance" before they can be implemented. This is an expeditious screening process in which the submitting jurisdiction has the burden of showing the change does not have a racially discriminatory purpose and will not have a discriminatory effect. If this showing is not made, the Department "objects" and the change is blocked. The greatest application of section 5 is in the South.

Since *Baker v. Carr* in 1962, the courts have gone through three generations of redistricting law. In the 1960s there was a drive for mathematical equality, creating the rule of one-person one-vote. In the 1970s the courts began striking down plans that were found to dilute the votes of minority voters — sometimes through districts that were racially gerrymandered, and more often through using at-large elections to avoid districting altogether. In the 1990s the Supreme Court created a new body of redistricting law designed to protect white voters.[1]

The issue in this decade will be how to reconcile these mandates, and here the role of the Justice Department is critical. The Supreme Court cases following *Shaw* have developed a somewhat shifting and ill-defined body of law, mostly in examining plans drawn before *Shaw* was decided.[2] The new plans will be the first widespread efforts to apply the new jurisprudence, and the cases will likewise be the first to review a generation of post-*Shaw* plans.

The question is whether the new plans will seek to protect minority voters from vote dilution. The *Shaw* cases do not end the need to avoid minority vote dilution, nor do they bar use of race as a factor in creating district lines. The most recent North Carolina case upheld a congressional districting plan that took account of race in drawing lines to avoid minority vote dilution. The Court indicated that taking account of race is likely to be inevitable, and that it does not invalidate a plan without evidence that race was the predominant concern over and above politics or other "traditional state criteria."[3]

The Justice Department should vigorously bring suits under section 2 and deny preclearance under section 5 to plans that dilute minority voters' votes. Moreover, the Department should seek to join cases as

amicus curiae where significant issues under *Shaw* arise. This amicus role is not new. The Department played a crucial role in arguments before the Supreme Court in the 1950s cases that first shaped redistricting law. So important were these cases that arguments were presented not only by Solicitor General Archibald Cox, but also by Attorney General Robert F. Kennedy, who chose the Georgia county unit system case as the occasion for his first and only Supreme Court argument.[4]

We are at a crossroads. How districts are drawn in thousands of city, county, and state bodies will test whether we mean to include everyone in our democracy. There is significant pressure to abandon the quest for fairness to minority voters. The Department of Justice needs to lead the defense against that pressure.

II. Section 5

The Department of Justice should vigorously enforce section 5 of the Voting Rights Act.

The federal government's most prominent executive function relating to voting is its enforcement of section 5 of the Voting Rights Act, which requires preclearance of voting changes in various states, mostly southern. The Voting Rights Act, first passed in 1965 and extended several times since then, has been called the most successful civil rights law ever passed. It has had at least three lives. Its first and most electrifying success was in section 4, which — almost overnight — ended generations of outright disfranchisement of black voters throughout the South.[5,6]

It took only a few years for black registration to swell. Once black voters could no longer be kept away from the polls, however, new tactics arose, commonly grouped under the heading of vote dilution. And here the genius of section 5 came into play. Section 5 was a preventive response to the massive resistance described by Mississippi Governor J.P. Coleman, who said that any southern legislature could pass new laws faster than federal courts could strike them down. Previous laws had foundered; southern states simply ran around them by adopting new schemes. In section 5, Congress stopped trying to play "catch-up" and said in effect, "We don't know what tactics you will try, but we know you will try something and when you do we will be ready for you ahead of time."

Thus section 5 created a novel procedure by which any voting change in a "covered" jurisdiction[7] was blocked and could only be put into effect if the jurisdiction showed the change had no discriminatory purpose or effect. Thus, the burden was shifted from the voter to the jurisdiction in two ways: procedurally, because the preclearance requirement was automatic so the jurisdiction had to make the necessary showing without anyone having to file a suit, and substantively, because the jurisdiction had the burden of proving non-discrimination rather than the voter having to prove the opposite.[8]

Section 5 has been an extraordinarily successful prophylactic. It has been applied in numerous types of voting changes, including such changes as new election methods, shifting polling places and many others — but most notably redistricting. In recent years the number of submissions has mushroomed, especially after each decennial census when redistricting plans are submitted by states, counties, cities, school boards, hospital and water districts, etc. Much of the business has involved redistricting.

In the first several years, most section 5 submissions related to restrictions on the right to register and vote. That changed after a 1969 Supreme Court decision that brought within the ambit of section 5 any

change that could affect a person's vote in the slightest, and that recognized that a voter could be injured by vote dilution as well as by outright denial.[9] Therafter the number of submissions mushroomed, and vote dilution as a concern came to the forefront. It is no exaggeration to say that the administrative process of section 5 and the presence of an agency developing expertise helped rapidly develop a jurisprudence of vote dilution.

Section 5 has not only blocked outright efforts to discriminate; it has helped ensure that jurisdictions making voting changes pay close attention to ensure fairness. It plays a fundamental role in preventing vote dilution, and the Department of Justice must continue to enforce it vigorously in line with its important purposes.

III. Expiration of Section 5

The Department of Justice should prepare for 2007.

Section 5 of the Voting Rights Act, originally passed for 5 years, has been extended in 1970, 1975, and 1982, the most recent time for a period of 25 years through the year 2007. What will happen in 2007?

Each time section 5 has come up for expiration or renewal, there have been those who said it was no longer needed and should be ended. Although the burden of compliance by covered jurisdictions is not great, the concept of singling out some states for a special procedure has created strong pressures against its continuation. In 1982, these pressures were overcome by presentation of an extensive record in hearings before U.S. House and Senate Committees of continued abuses necessitating extension. A devastating cartoon in a Birmingham newspaper showed a herd of sheep in the foreground with a pack of wolves just beyond, while the shepherd tells the guard dog, "You've done a good job; I guess we won't be needing you any more."

It is too early to tell now whether section 5 should be extended again or not when 2007 arrives. Two things need to be done, though. First, of course, the Department of Justice needs to be keeping a careful record as it administers the statute. Second, no matter what happens in 2007, vote dilution will not have ended, nor will the difficulty of using the court system to combat vote dilution. Therefore, if there are valid arguments in 2007 against simply extending section 5, there needs to be something in place as a substitute weapon again vote dilution. Those who expect to advocate an end to section 5 in 2007 will be called on to tell us what will replace it, and it is not too early to begin developing a permanent and universal system today. The Department of Justice should do so.

IV. Section 2

The Justice Department should litigate vigorously under section 2.

Section 2 of the Voting Rights Act came about because of an aberrant decision by the Supreme Court in the *City of Mobile* case.[10] In that case, the Court turned its back on its own jurisprudence and held that vote dilution could not be proved except by specific proof of discriminatory intent.[11] Editorial writers around the country were properly brutal in ridiculing the Court's opinion. One editorial, referring to the fact that the Mobile plan was more than a century old, said, "It would be a good trick to subpoena the legislators from their graves."

Congress likewise was moved to action. Because the Supreme Court's straitjacketed interpretation of the 14th and 15th Amendments could not be changed by Congress, that body instead executed its constitutional authority to enforce voting

rights by amending section 2 of the Voting Rights Act. That section, which had originally followed the language of the 15th Amendment, was now amended to include an explicit "results" test, which remains in the statute today.[12]

As discussed above, the Justice Department has filed suit under section 2 in a number of redistricting cases, and it is recommended that this activity should increase. However, it is not only districting cases that call for section 2 treatment. Indeed, the Supreme Court's decision in *Bush v. Gore* creates a new mandate for applying section 2. That mandate will be discussed below in connection with the discussion of that case.

V. Other Voting Rights Authority

The Department of Justice should initiate litigation under other voting rights statutes.

In 1939, then-Attorney General Frank Murphy asked attorneys in the Department of Justice to examine whether there was any civil rights enforcement authority in existing federal law. This led to the revival of several long-dormant Reconstruction-era statutes, which were used to bring criminal civil rights prosecutions like the *Screws* case and later the Neshoba County, Mississippi, murders.

Today it is appropriate again to look at the U.S. Code for statutory authority that the Department of Justice may use to seek voting rights and voter equality.

Of course there is section 2 of the Voting Rights Act, which bars voting practices that discriminate on account of race in purpose or result. This section has been used in many situations to attack practices that are "fair in form but discriminatory in operation" — like the fabled offer of milk to the stork and the fox.[13]

A possible list of other federal statutes would include two sections of the 1964 Civil Rights Act, one section of the Voting Rights Act of 1965, and one section of the National Voter Registration Act:

- Section 101 of the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A), enacts what was known as the "freezing principle," by providing that no state or local official may apply differential standards or procedures in determining voter qualifications.

- Another subsection of section 101, 42 U.S.C. § 1971(a)(2)(B), enacts a "materiality" rule in providing that no one may be prevented from voting because of an error or omission that is not material in determining the voter's qualifications.

- Section 10(a) of the Voting Rights Act, 42 U.S.C. § 1973i(a), makes it illegal to fail or refuse to permit any qualified person to vote.

- Various portions of section 8 of the National Voter Registration Act, 42 U.S.C. § 1973gg–6, regulate the grounds and methods of removing voters' names from the registration list.

While these sections may not reach as far as section 2 of the Voting Rights Act in addressing subtle discrimination that is uniform on its face, they are powerful weapons because the proof requirements are straightforward. In effect they provide strict liability. Moreover, each of them applies to all elections — federal, state, and local — except for the NVRA, which applies only to federal elections. The Department of Justice has specific statutory authority to bring suits under each of these sections.[14] Finally, their potential scope is quite broad because of the definition of vote or voting:

The term 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to [the Voting rights Act], or other act required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.[15]

Overall, Congress has given the Department of Justice broad authority to ensure that the right to vote is real and fair.[16]

VI. *Bush v. Gore*

The Department of Justice, the Federal Election Commission, the U.S. Commission on Civil Rights, and other arms of the federal government should move forward to apply the lessons learned in the 2000 Presidential election.

Just adding to the chorus of opinions about the 2000 elections is not the purpose here. Rather the purpose is to see how the administration can help us make improvements.

The 2000 Presidential election, especially the events in Florida, taught us that we have a Model T election system, and also taught us some subsidiary lessons, including:

- The problems we saw in Florida are widespread throughout the nation.
- They harm everyone; for example, an estimated 2 million Presidential votes went uncounted because of undervotes or overvotes.
- They often harm poor and minority voters disproportionately.
- They violate the Constitution, according to the U.S. Supreme Court.

Attention has focused on the most obvious category of problem, the different methods of casting and counting ballots. "Punchcards" of various kinds appear to be the biggest culprits, and their elimination is the most evident and widespread change taking place (as recommended by the Federal Election Commission more than a decade ago). But that should not be the end of change.

A host of other problems occurred or are said to have occurred in Florida. Other kinds of voting machines had operating or counting problems. Registration lists at polling places were inaccurate. Lists of voters disqualified for felony conviction were inaccurate, causing some voters to be illegally rejected while others were allowed to vote despite convictions. Polling place officials could not reach central offices to solve disputes about eligibility.

Well, guess what? These problems happen all the time in American elections, in every state. They hurt all voters, and all voters have a stake in devoting the resources to provide the necessary technology and training for officials in order to minimize the error rate.

The problems are aggravated because they are not necessarily evenly distributed. Wealth, political partisanship, and race play parts in how the problems are distributed. Wealthier counties can better afford to spend money on modern voting machines. In Florida, the State created a computer program that could be accessed by laptop computers to resolve eligibility disputes on the spot, but only the wealthier counties bought them, while poorer counties were left with the futile (but traditional) method of trying to use the one available telephone to

call the always busy central registration office. In one county registration officials saw errors on absentee ballot request forms, and alerted Republicans (but not Democrats) who then came in and corrected them. At least 8000 voters, mostly black, were erroneously disqualified by a process designed to purge convicted felons (apparently carried out at the polling places on Election Day rather than well beforehand as typically required of all purges — with the voter receiving ample notice and opportunity to challenge errors).

A number of states have begun to study their election processes and make legislative changes. A common problem so far seems to be an unwillingness to spend the necessary money. For example, Georgia has passed a reform bill — with no funding. South Carolina appointed a commission that recommended numerous changes — but the General Assembly skipped the most important and expensive ones.

Private lawsuits have been brought in several states, generally seeking reform that is both across-the-board and seeks to eliminate inequalities of every kind.

The Supreme Court in the *Bush v. Gore* decision appeared to set new standards for electoral equality. "Having once granted the right to vote on equal terms, the State may not by later arbitrary and disparate treatment, value one person's vote over that of another."

There have been no Supreme Court or lower court decisions since to explain how far this rule goes. Specifically, the question is whether this mandates an equal opportunity *statewide* to cast effective ballots. The Court's opinion contains some language giving room for local differences but not on the basis of wealth. "The question before the Court is not whether local entities *in the exercise of their expertise* may develop different systems for implementing elections." Instead, the Court said, it was the actions of a state agency — in this case a court — "with the power to assure uniformity" that did not provide equal treatment.[17]

If the Supreme Court retreats from the strong equal protection position it took in *Bush v. Gore*, that will put the decision into the class — as a former Justice described an earlier case — of "a restricted railroad ticket, good for this day and train only."[18]

The federal government can help ensure that does not happen.

The Department of Justice can and should participate in litigation to bring about statewide uniformity in each state. The pattern is not new. Even after the U.S. Supreme Court rejected a federal right to statewide equal education opportunity, many states have acted to secure such a right, either by state legislative action or by state court decisions. The Department of Justice has the statutory authority, as explained above, to press such a litigation program.

In addition, other agencies, such as the Federal Election Commission[19] and the U.S. Commission on Civil Rights, have important information-gathering and -exchange functions. They can help the states achieve equality among their voters.

VII. Congressional Action to Improve Registration and Voting

The administration should seek legislation to require minimum standards, accompanied by federal funding if necessary.

The Constitution gives Congress virtually plenary power over federal elections. Through exercise of this power Congress in a practical sense controls all elections, because the power over federal elections includes regulation of all elections conducted at the same time and place as the federal elections — i.e., state offices on the

same ballot as congressional elections in November of even-numbered years. States may theoretically have two election systems, but the cost is high and would undoubtedly spur voter revolt.

Whereas the Civil Rights Acts and the Voting Rights Act were based largely on Congress' power to enforce the 14th and 15th Amendments, other statutes, mainly the NVRA, have been based on Congress' power over federal elections. Congress could act likewise to ensure minimum standards and statewide equality in election procedures. If needed, Congress could also authorize appropriations to help the states carry out the new federal equal standards. (Unlike exercise of the spending power, the states would not have the choice of ignoring the substantive provisions of the law by rejecting the money.) This does not necessarily mean the same standards in each state, but the same standards within each state.

State and local control over elections is an American tradition. The Supreme Court overrode that tradition. If that decision is to bring reform rather than simply deciding one political election, it is time to follow up with federal legislation to set minimum standards.

VIII. Conclusion

There has never been a better time to improve our Model T system that needs so much improvement. We trail all the world's democracies (and many of the dictatorships) in voting participation. People who are poor and minority bear the special brunt of the problems, but everyone pays a heavy price. The administration can lead the way to bringing real democracy and a truly republican form of government to the United States.

Endnotes

[1] These cases are commonly known as *Shaw* cases, after the case that first began the doctrine, *Shaw v. Reno*, 509 U.S.C. § 630 (1993). The author believes this is a fallacious and ephemeral jurisprudence, reflecting little more than Justices' and judges' attitudes of white supremacy, ranging from slick to crude. This chapter, though, deals with the world as it is.

[2] The first decision in *Shaw v. Reno* created a cause of action for voters to challenge the use of race as a factor in redistricting, without requiring a showing of injury or intent to injure. Later cases have developed the (often-shifting) standards for liability in such cases; the current rule is essentially that race may be a factor as long as it does not overcome "traditional" redistricting principles such as incumbent protection. The main examples of cases reviewing plans drawn after — and in light of — *Shaw* is the set of North Carolina cases following *Shaw v. Reno* itself. There have been three, in which the Supreme Court has reversed the lower court three straight times. *Shaw v. Hunt*, 517 U.S.C. § 899 (1996), *Hunt v. Cromartie*, 526 U.S.C. § 541 (1999), *Hunt v. Cromartie*, 532 U.S.C. § 234 (2000).

[3] *Hunt v. Cromartie*, 532 U.S.C. § 234 (2000).

[4] On Jan. 17, 1963, Attorney General Kennedy argued as amicus in *Gray v. Sanders*, 372 U.S.C. § 368 (1963). On four days in Nov. 1963 Solicitor General Cox argued the four cases that included *Reynolds v. Sims*, 377 U.S.C. § 533 (1964).

[5] The main engine of enfranchisement was the suspension of literacy tests across the South, enforced by taking registration out of the hands of local registrars where they would not comply. The 1965 Act also hastened the end of the poll tax in the last few states where it still existed. After suspension of literacy tests in the South did not bring the world to an end, the experiment was made permanent and universal when the 1970 extension of the Act ended literacy tests everywhere.

[6] The Voting Rights Act was the fourth modern attempt to end disfranchisement of black voters. The Civil Rights Acts of 1957, 1960, and 1964 targeted specific disfranchising schemes but produced little change. The sweeping approach of the Voting Rights Act of 1965 was born out of frustration at the failure of these earlier efforts.

[7] The coverage formula or "trigger" swept in states or parts of states that used literacy tests *and* that had low voter turnout rates in 1964, which formed the basis for a presumption that the literacy tests were discriminating. (All literacy tests nationwide were suspended by Congress in 1970 and banned permanently in 1975).

[8] In fact there have had to be a few suits to enforce section 5, but the only requirement in such suits is proof that a voting change has occurred. When that is proved, usually a simple matter, the suit is ended and the change is unenforceable without preclearance.

[9] *Allen v. State Board of Elections*, 393 U.S.C. § 544 (1969).

[10] *Mobile v. Bolden*, 446 U.S.C. § 55 (1980).

[11] The leading case ignored by the Supreme Court was *White v. Regester*, 412 U.S.C. § 755 (1973). The *Mobile* opinion listed *White* as a prior consistent case that had held proof of discriminatory purpose was essential to find at-large elections violate the 14th Amendment. Plainly, *White* did no such thing.

[12] Ironically, as the 1982 extension of the Voting Rights Act, including section 2, was roaring down the track to enactment by lopsided votes in both houses of Congress, the Supreme Court moved to take some of the sting out of the *Mobile* decision by deciding *Rogers v. Lodge*, 458 U.S.C. § 613 (1982). In that case, a majority of the Court struck down at-large elections in Burke County, Georgia, on evidence that was almost a carbon copy of that which was found insufficient in Mobile, Alabama. If the New Deal Supreme Court could read the election returns, this Court could read the editorials.

[13] The Aesopian reference and the quotation come from Chief Justice Burger's opinion in *Griggs v. Duke Power Co.*, 401 U.S.C. § 424 (1971), which invalidated discriminatory tests and employment requirements under Title VII of the Civil Rights Act of 1964.

[14] *E.g.*, 42 U.S.C. § 1971(c), 42 U.S.C. § 1973j(d).

[15] 42 U.S.C. § 1973l(c)(1). The definitions in the other statutes have small wording differences.

[16] It is unclear whether the Department of Justice has authority to bring suits to enforce 14th or 15th Amendment rights apart from the specific grants of authority to enforce particular statutes. While these specific grants of authority would probably cover most suits the Department might bring, there may well be suits that would not fit, for example, a due process violation in a procedure that might not fit within the broad definition of voting. If the occasion arises, the Department should not hesitate to bring suit directly under the 14th or 15th amendment and have that general authority tested.

[17] The issue is reminiscent of the "statewide school funding" cases of the 1970s, which culminated in *San Antonio Independent School District v. Rodriguez*, 411 U.S.C. § 1 (1973). In that case a majority of the Supreme Court rejected claims that the equal protection clause required states to provide or fund equal education opportunities. Education, like voting, has been typically administered and funded locally, which means large differences between the opportunities found in rich versus poor areas. The Supreme Court in *Rodriguez* found no right to equal education opportunity, but said voting is different because the equal right to vote (although not the right to vote itself) is fundamental. *Bush v.Gore* should also teach us that, because all state voters compete with each other in statewide elections, the state – which has the power to assure uniformity — cannot allow voters in one area of the state to buy better votes.

[18] *Smith v. Allright*, 321 U.S.C. § 649, 669 (1944) (Roberts, J., dissenting).

[19] Under 2 U.S.C. § 438(a)(10), the Federal Election Commission is specifically directed to "serve as a national clearinghouse for the compilation and review of procedures with respect to the administration of federal elections . . ."